B.C.D. 03-38

MAY 06 2003

Employer Status Determination
Rail Temps, Inc.

This is the decision of the Railroad Retirement Board regarding the status of Rail Temps, Inc. as an employer under the Railroad Retirement Act (45 U.S.C. § 231 et seq.)(RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.)(RUIA). Information about Rail Temps, Inc., was provided by Mr. Ronald A. Lane, Fletcher & Sippel, LLC, counsel for Rail Temps. Mr. Lane requested confirmation that Rail Temps, Inc. will have no obligation to make Railroad Retirement or Railroad Unemployment Insurance tax payments and that the contractors and the railroad clients of Rail Temps will have satisfied any such tax liabilities they may have incurred.

The Board must point out initially that no taxes are assessed or paid pursuant to the RRA. The RRA provides in general for the payment of retirement and disability benefits to railroad employees and their families. Benefits payable under the RRA are financed by taxes imposed under the Railroad Retirement Tax Act (26 U.S.C. § 3201 et seq.) (RRTA), which is administered by the Internal Revenue Service. While the Board has jurisdiction to determine whether a particular entity is covered as an employer under the RRA and the RUIA or whether services performed by an individual constitute employee services under those Acts, only the Internal Revenue Service has authority to determine tax liability under the RRTA. Thus, after consideration of the information provided by Mr. Lane and summarized below, the Board addresses only the coverage issues under the RRA and RUIA and makes no determination of the existence or non-existence of any tax liability under the RRTA.

As mentioned above, the Board is relying on information provided by Mr. Lane in connection with the following description of Rail Temps. Rail Temps is an Illinois corporation incorporated October 3, 2001, for the purpose of conducting "a temporary worker referral service for railroads and industries that operate non-carrier railroad facilities." It began operations in April 2002. Its owners are Homer C. Henry and Terese M. Jones, who also own Transportation Certification Services, Inc.[1], an Illinois corporation that provides training for railroad operating employees, and provides railroad consulting services. Neither Mr. Henry nor Ms. Jones owns a railroad carrier.

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[1] Transportation Certification Services was held not to be a covered employer under the Acts and its employees were held not to be providing services as employees under the Acts (B.C.D. 95-40, March 20, 1995).

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Rail Temps refers qualified individuals to perform railroad operating functions on a temporary basis. Those individuals include locomotive engineers, conductors, trainmen, dispatchers, and other railroad operators. Rail Temps contracts with these individuals and pays them based on the time they spend performing services for a rail client of Rail Temps. Rail Temps is in turn compensated by its rail clients for services performed for them by Rail Temps' contractors.

Under the contracts with the individual contractors, Rail Temps refers the individuals for a specific assignment for a specified length of time, which may be extended. The rail client has a right to reject the individual or to terminate the assignment. Rail Temps pays the individual a daily service fee and reimburses him or her for certain specified expenses. Payment to the contractor is made by Rail Temps after Rail Temps is paid by the rail client. The individual agrees to perform all train operation services as requested by the rail client (subject to legal restrictions). Under those contracts, the individuals are referred to as independent contractors. However, the contract also provides that the rail client will pay the appropriate taxes under the RRTA and the RUIA.

Under the contracts with its rail client(s), Rail Temps agrees to establish a pool of qualified locomotive engineers and other operators and to make a good faith effort to supply the needs for temporary employees. Rail Temps will invoice the clients for fees and certain specified expenses.

During its existence, Rail Temps has had only two clients: Portland & Western Railroad, Inc., a covered employer under the Acts (B.A. No. 2776) and Caliber Auto Transport, an automobile ramp operator. It provided individuals who performed train and engine work to Portland & Western for the period May 1 through May 22, 2002[2]. These individuals were then hired directly by Portland & Western.

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)), insofar as relevant here, defines a covered employer as:

[2] Stated to be "2001" in the material submitted.

Rail Temps, Inc.

> (i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of title 49, United States Code;
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> (ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad * * *.

Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

The available evidence indicates that Rail Temps is not under common ownership with any rail carrier and is not controlled by officers or directors who control a railroad. Therefore, Rail Temps is not covered as an affiliate employer under the definition in subparagraph (ii) quoted above. However, for the reasons explained below, a majority of the Board finds that by virtue of its contracts with rail carriers to provide operating personnel to those carriers, Rail Temps has itself become a rail carrier employer under the Acts administered by the Board.

Rail Temps provides to the railroads with which it contracts personnel who are essential to the railroads' fulfillment of their common carrier obligations. Rail Temps finds the individuals to provide such services, bills the railroads for those services and pays the individuals for the services provided. The operation of trains in interstate commerce is a rail carrier activity that is subject to Surface Transportation Board authority. Through its contracts with the railroads, Rail Temps has taken on the responsibility for this rail carrier activity. The evidence submitted shows that the work performed by the individual contractors under their contracts with Rail Temps is that of the various functions involved in operating the trains (i.e., locomotive engineers, conductors, trainmen, dispatchers, and other railroad operators). The Board has found that an entity that contracts to provide railroad operations is covered as a rail carrier employer. See, e.g., B.C.D. No. 03-23, Massachusetts Bay Commuter Railroad Company, LLC. A majority of the

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Board now finds that by contracting to provide individuals to operate trains, Rail Temps has become a rail carrier employer. Accordingly, it is the determination of a majority of the Board that Rail Temps became a rail carrier employer under the Railroad Retirement and Railroad Unemployment Insurance Acts effective April 1, 2002, the first day of the first month in which it began operations.

Original signed by:

Cherryl T. Thomas

V. M. Speakman, Jr. (Separate concurring statement attached)

Jerome F. Kever (Dissenting, separate dissenting opinion attached)

DISSENT OF THE MANAGEMENT MEMBER
RAIL TEMPS, INC.
April 30, 2003

A majority of the Board has determined that Rail Temps, Inc. is a covered employer under the Railroad Retirement Act (RRA) and Railroad Unemployment Insurance Act (RUIA). Since there is absolutely no legal basis to support this decision, I strongly dissent from its grounds.

Rail Temps, Inc. was incorporated in 2002 as a temporary help agency providing temporary workers in the operating crafts, mainly in train and engine service. Rail Temps receives a fee plus applicable wages from its rail carrier clients for the temporary workers it provides to them. In each contract between Rail Temps and a rail carrier, the carrier reports the temporary workers provided by Rail Temps as employees under the RRA, RUIA and Railroad Retirement Tax Act (RRTA). The carrier also withholds applicable Railroad Retirement taxes from amounts paid to Rail Temps.

The definition of rail employer is substantially identical within the inter-related RRA, RUIA, and RRTA. Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)), insofar as relevant here, defines a covered employer as:

> (i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of title 49, United States Code; and
>
> (ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad * * *.

Sections 1(a) and 1(b) of the RUIA (45 U.S.C. § 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the RRTA (26 U.S.C. § 3231).

In its decision, the majority correctly finds that Rail Temps is not owned or controlled by any affiliated covered employer. However, the majority erroneously finds Rail Temps to be a rail carrier subject to the jurisdiction of the Surface Transportation Board (STB), under the first test citing the Massachusetts Bay Company Railroad (MBCR) decision (B.C.D. 03-23) as precedent. In that decision, the Board found MBCR to be a covered employer because it contracted with the Massachusetts Bay Authority to operate commuter passenger service over thirteen lines of railroad and 350 total route miles in the Boston metropolitan

area. MBCR succeeded AMTRAK as the operator of the passenger service and thus assumed all of the responsibility and obligations associated with operating a passenger rail service.

As contractors of rail services, however, MBCR and Rail Temps share little in common other than the fact that Rail Temps provides operating employees albeit on a temporary basis. Whereas MCBR has contracted to operate all aspects of a passenger service, Rail Temps, Inc. specifically contracts only to provide individual temporary employees as needed by the operating carrier. Rail Temps does not operate any freight or passenger service. It has neither the obligation nor the right to supervise, manage or operate the train service of its clients. Moreover, as previously noted, the contract between Rail Temps and its customer railroads requires each railroad to treat the temporary workers provided by Rail Temps as employees for Railroad Retirement reporting purposes. Accordingly, I do not agree with the majority that the MBCR decision provides a basis at law for a finding that Rail Temps is a covered employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

I have also reviewed the applicable statutory provisions within the Railroad Retirement Act (RRA) and related railroad acts, such as the ICC Termination Act of 1995 and the Railway Labor Act (RLA), to determine if these provide any basis of support for the majority's holding that Rail Temps is a covered employer under the Acts. I find no such basis in law, for the following reasons.

The definition of an employer under the Acts is identical to the definition of a rail carrier under the RLA. The intent of Congress was to apply the same pension and labor laws to railroad workers. Both statutes incorporate deference to the authority of the STB, formerly the Interstate Commerce Commission, pursuant to the ICC Termination Act of 1995. The ICC Termination Act defines a rail carrier subject to jurisdiction of the STB as follows:

> Means a person providing common carrier railroad transportation for compensation ..... (49 U.S.C. 10102 (5))

Railroad includes:

> A) a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad;
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> B) the road used by a rail carrier and owned by it or operated under an agreement; and
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> C) a switch, spur, track, terminal, terminal facility, and freight depot, yard, and ground, used or necessary for transportation;

To fall under the jurisdiction of the STB, a carrier must provide freight transportation or passenger service and offer these services to the public. If such services are regulated, the carrier must seek authority from the STB for common carrier services. Unless it receives an exemption from the STB, the carrier is then subject to certain rate, route, and other regulatory requirements. Rail Temps clearly does not fall within the STB's jurisdiction because it does not meet the definition of a common carrier. The railroads which contract with Rail Temps are, however, common carriers subject to STB jurisdiction. In contracting with Rail Temps, the railroads do not delegate, and Rail Temps does not assume, authority for operating the railroads. Rail Temps does not contract with its customer railroads for trackage rights, lease rights or even joint authority to operate over the tracks. Accordingly, the majority's finding that Rail Temps is subject to the jurisdiction of the STB is absurd, and could potentially result in the even more absurd application of law as described further below.

Under the majority's reasoning, if Rail Temps is a covered employer under the Acts, then it would also be subject to the RLA, despite clear legislative intent that jurisdiction of the RLA be limited to rail carriers. In interpreting the scope of jurisdiction under the RLA, the reviewing courts cited Joseph B. Eastman, then Federal Coordinator of Transportation. See, for instance, Missouri Pacific Truck Lines, Inc., 3 Cl.Ct. 14 (1983). In his testimony to the United States Senate Committee on Interstate Commerce on April 19, 1934, Eastman recommended that the jurisdiction of the RLA be limited, as follows:

> "It is difficult to know just where to draw the line. I am inclined to believe that for the present it would be well not to go beyond carriers and their subsidiaries engaged in transportation."

Subsequently, as referenced earlier, a substantially identical definition of rail carrier under the RLA was incorporated into the RRA, RUIA and RRTA definitions of rail employer.

Arguendo, if Rail Temps is reasoned to be a rail employer under the Acts and, by virtue of the same reasoning, therefore a rail carrier under the RLA, then employees of Rail Temps would have the right to seek union representation and collective bargaining agreements with Rail Temps. Absurdly, the majority's reasoning could ultimately result in two sets of unions representing the same craft on a single property. Such a result is clearly inconsistent with the intent of the RLA. This result makes no sense and is made possible only through misapplication of the definition of rail employer contained in the RRA and RUIA to Rail Temps.

In determining that Rail Temps was a covered employer, the majority has not only relied on a distinguishable case (MBCR) and misinterpreted the applicable statutes, it has also ignored longstanding Board practice and precedent. The Board has held repeatedly that persons who perform work as engineers and

conductors on another carrier's property are treated under the RRA as employees of that carrier. See, for instance, Ontario Eastern Railroad Corporation d/b/a Jersey Southern Railway (L-85-121), and Adalujsia and Conecuh Railroad (L-85-78). Those decisions were properly based on the Board's employee coverage law and regulations. Section 1(b) of the RRA and section 1(d) of the RUIA both define a covered employee as an individual in the service of an employer for compensation. Section 1(d)(1) of the RRA further defines an individual as "in the service of an employer" when:

> (i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and
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> (ii) he renders such service for compensation * * *.

Section 1(e) of the RUIA contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the RRTA (26 U.S.C. § 3231(b) and (d)).

The focus of the employee coverage test under paragraph (i)(A) is whether the individual performing the service is subject to the control of the railroad entity, not only with respect to the outcome of his work, but also with respect to the way he performs such work. The evidence of record in this case establishes that the work performed by the individual workers supplied by Rail Temps can only be performed under the control and direction of the rail carriers, not by Rail Temps. Accordingly, the Board had the authority in this case to find Rail Temps' temporary workers to be employees of its rail employer clients for purposes of the Acts.

In fact, the majority's decision in this case notwithstanding, as a matter of law, Rail Temps' temporary workers will still be employees of its client railroads. It is undisputed that Rail Temps does not supervise the workers at issue while they are on the railroads' property. Rather, the workers are supervised by client railroad management. Railroads control the rules and policies that the conductor or engineer must abide by while operating the train. They direct and schedule the movement of the trains. Under the Board's regulations, these temporary workers would be considered employees of the railroad carriers under sections (i)(A) and (i)(C) above regardless of whether Rail Temps is considered an employer. To do otherwise would completely turn the employee regulations and precedent upside down.

So one must question how the majority of the Board arrived at the decision in Rail Temps despite the statutory, regulatory and Board precedent, all of which

contravenes the majority's reasoning. I posit that the majority has improperly deferred to certain administrative concerns, both of which could have been addressed internally in satisfactory ways. First, it is clear that at least one member of the majority deferred to the administrative concerns of the Retirement Board's Inspector General; concerns which were sufficiently addressed by the Board's own General Counsel in recommending that Rail Temps be treated as a payroll agent, and thus subject to certain employer reporting requirements. In a memorandum from the Labor Member dated March 7, 2003, he indicated that deference as follows:

> Furthermore, it is my understanding that the OIG has an open criminal investigation with Transportation Certification Services (TCS) and one of its owners, Mr. Homer Henry (also part owner of [Rail Temps]). The OIG has expressed concerns that based on its past experience with Mr. Henry, if [Rail Temps] is not held accountable for the compensation and service reports under the RRA and RUIA and for paying the RUIA contributions, lack of compliance will result.
>
> If [Rail Temps] itself is not covered there would be no way to ensure the integrity of the compensation and service reports by the various railroads nor the compliance with regard to the RRA tax payments to the IRS, and RUIA contributions to the RRB. This is especially significant given past complaints involving Mr. Henry.
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> In view of the regulatory and administrative considerations, [Rail Temps] itself should be a covered employer. .....

The Labor Member refers to issues raised by the Inspector General (IG) in a memorandum dated August 23, 2002 concerning Rail Temps. The IG stated as follows:

> Also, the Board's coverage decision should require Rail Temps, Inc. to notify the Board on a monthly basis of any changes in its operations, ownership or control. Rail Temps, Inc. should also identify all contractors by name, social security number and other personally identifying information and should identify all contractors by name, social security number and should identify whether any of these individuals are currently receiving an annuity under the RRA and RUIA.

Apparently, the majority was swayed by the arguments of the IG that, absent making Rail Temps a carrier, the Board could not ensure that the temporary workers would be properly reported under the RRA and RUIA. A coverage determination of payroll agent, however, would have allowed the Board to require

employer reporting by Rail Temps, which could then have been used as needed to audit the reporting of Rail Temps' client rail carriers.

More importantly, the Board alone has the program responsibility and exclusive authority to issue coverage determinations under the RRA and RUIA. In exercising its coverage determination authority, the Board may take into account the interests of the IG, but it is best to do so in open discussion where all relevant questions may be asked and all factual matters discerned; and in no case may the Board prefer the IG's administrative interests to such an extent as to reach a legally unsupportable holding. Further, with regard to deferring to the IG in this matter, it is worth noting that on April 21, 2003, the Board received notice from the U. S. Attorney's Office of the Northern District of Illinois that it was declining to prosecute all pending criminal and civil matters against TCS.

Second, in addition to the IG's recommendations, the Labor Member also indicated that he had discussions with personnel in the Board's Bureau of Fiscal Operations (BFO), who opined that it would be administratively cumbersome to treat Rail Temps as a payroll agent. Let me point out that the Labor Member did not share any of his discussions with BFO with the entire Board so that the Board might engage in open discussions about these internal matters. Accordingly, the entire Board did not have an opportunity to fully address this issue. Regardless of how the matter was handled, however, the fact remains that the Board should not set aside matters of law in order to preserve administrative convenience. I would also point out that if the Board was uncertain whether Rail Temps was in fact a carrier, the Board could have sought advice from the Surface Transportation Board. In a matter currently pending before the Board, the Board has stayed its decision pending a determination by the STB. Alternatively, the Board could have ordered a hearing in this matter or sought public comment through the *Federal Register* as it did in the Railroad Ventures case.

For all the reasons stated above, the majority's decision flies in the face of decades of settled case law and precedent. The jurisdictions of the ICC Termination Act of 1995, the Railway Labor Act, the Railroad Retirement Act, the Railroad Unemployment Insurance Act, and the Railroad Retirement Tax Act are all predicated upon the same basic definition of a rail carrier. Accordingly, the majority's decision cannot stand because the Board simply does not have the authority to expand its jurisdiction beyond that of the Surface Transportation Board. Consequently, while the Board has exercised its right to interpret the jurisdiction of the STB in previous cases, this deference could be severely limited upon further judicial review. The majority of the Board has unsettled the basic underpinnings of the interlocking set of laws that regulate and provide employee benefits to railroad workers without any purpose other than administrative convenience. Problems in administering the RRA and RUIA may be of interest to Congress, but in this case it is possible to administer the correct application of the law. The Railroad Retirement Act's coverage provisions and corresponding regulations could have been properly applied to Rail Temps' temporary workers,

rendering them covered employees subject to the Acts. The majority's decision in effect amends the laws covering railroad employee pension and labor rules; this function, however, is the sole prerogative of Congress.

For the reasons as stated, I therefore respectfully dissent.

Original signed by:

Jerome F. Kever
Management Member

CONCURRING STATEMENT
OF
V. M. SPEAKMAN, JR.
WITH THE MAJORITY OPINION IN
RAIL TEMPS, INCORPORATED

The Office of the Labor Member, in voting as part of the majority decision to cover Rail Temps, Inc., as an employer under the provisions of the Railroad Retirement Act (RRA) and Railroad Unemployment Insurance Act (RUIA) makes the following statement in support of that decision.

We find it unfortunate that the Management Member of the Board has chosen to attack the professionalism of the majority for its reasonable fiduciary concerns and application of the law in making its decision.

The majority's rationale provides a valid justification for coverage, although the Management Member suggests that it has no support in law. The facts in this case belie the Management Member's position, however. Like Massachusetts Bay Commuter Railroad and numerous other entities that the Board has found to be carrier employers, Rail Temps employees are directly involved in railroad operations. They actually run the trains, and, clearly, operation of trains is carrier service.

Rail Temps has complete control of the salaries paid to its workers, acting more than as a "payroll agent" it actually employs individual operating employees for the purpose of "providing common carrier railroad transportation for compensation" (49 U.S.C. 10102(5)). With these duties comes the obligations and responsibilities of being a carrier. To allow a company such as Rail Temps to operate without the obligation to report service for its employees and meet its financial obligations under the programs administered by the Board would undermine the Railroad Retirement and Railroad Unemployment Insurance Programs.

The Management Member's implication that the majority should use the Railway Labor Act (RLA) as a litmus test for coverage is without sound basis. The RRA and RUIA are not controlled by provisions of the RLA and clear differences are apparent. For example, the RLA defines "carrier" as any company which is directly or indirectly owned or controlled by, or under common control with any carrier. The RRA and RUIA would not cover such a company as a carrier, but rather, as an affiliate of a carrier.

In making its decision, the majority did not defer to administrative concerns, as theorized by the Management Member, although administrative concerns in this case are substantial. In fact, such a claim is shown to be clearly without merit if one reviews the documentation used in the majority's decision. The administrative difficulties themselves, do not justify coverage, and this position was never asserted. Rather, it is Rail Temps' involvement in rail transportation including the hiring, providing, and

compensating of operating employees that is decisive. The discussion involving administration, although significant, is incidental to the ultimate determination. (Similarly, the minority's arguments, relating to collective bargaining issues under the RLA are not controlling).

I agree with the Management Member that the Board alone has the program responsibility and exclusive authority to issue coverage determinations under the RRA and RUIA. He is, however, presumptuous in suggesting that the majority is deferring to the Board's Inspector General in our final ruling, The Inspector General's recommendations were taken into consideration along with numerous other factors, which were discussed at the April 16, 2003, public Board meeting. It is also worth noting that representatives from the Association of American Railroads (AAR), the Union Pacific Southern Pacific Railroad, and Rail Temps itself, were in attendance at this public meeting. Mr. Edward Hamberger, President and Chief Executive Officer of AAR requested copies of all documents related to the Rail Temps case and these were provided prior to the meeting. It is telling that these individuals were given the opportunity to speak to this issue at the Board meeting, but declined to do so.

Accordingly, I restate my position that Rail Temps, Inc., meets the definition of "carrier" under the RRA and RUIA.

Original signed by:

V. M. Speakman, Jr.
Labor Member
MAY 06 2003